

**NOTICE OF PROPOSED RULEMAKING
TITLE 8. PUBLIC EMPLOYMENT RELATIONS BOARD
AGENCY FEE REGULATIONS**

The Public Employment Relations Board (PERB or Board) proposes to adopt, amend or repeal the regulations described below after considering all comments, objections, and recommendations regarding the proposed action.

PROPOSED REGULATORY ACTION

The Board proposes to amend sections 32990, 32992, 32994, 32995, 32996 and 32997, to repeal section 32991, and to repeal and adopt section 32993.

PUBLIC HEARING

The Board will hold a public hearing at 10:00 a.m., on February 8, 2007, in Room 103 of its headquarters building, located at 1031 18th Street, Sacramento, California. Room 103 is wheelchair accessible. At the hearing, any person may orally present statements or arguments relevant to the proposed action described in the Informative Digest. It is requested, but not required, that persons making oral comments at the hearing submit a written copy of their testimony at the hearing. Any person wishing to testify at the hearing is requested to notify the Office of the General Counsel as early as possible by calling (916) 322-3198 to permit the orderly scheduling of witnesses and to permit arrangements for an interpreter to be made if necessary.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comment relevant to the proposed regulatory action to the Board. The written comment period closes at 5:00 p.m. on February 5, 2007. Written comments will also be accepted at the public hearing. Submit written comments to:

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Public Employment Relations Board
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AUTHORITY AND REFERENCE

Pursuant to Government Code section 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Educational Employment Relations Act (EERA). Pursuant to Government Code sections 3509(a) and 3541.3(g), the Board is authorized to adopt, amend and repeal rules and

regulations to carry out the provisions and effectuate the purposes and policies of the Meyers-Milias-Brown Act (MMBA). Government Code section 3513(h) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Ralph C. Dills Act (Dills Act). Government Code section 3563 authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Higher Education Employer-Employee Relations Act (HEERA). Pursuant to Public Utilities Code section 99561(f), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA). Pursuant to Government Code sections 3541.3(g) and 71639.1(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Governance and Employment Protection Act (Trial Court Act). Pursuant to Government Code sections 3541.3(g) and 71825(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act).

General reference for section 32990: Sections 3502.5, 3515.7, 3540.1(i), 3543, 3546, 3583.5, 71632.5 and 71814, Government Code; Section 99566.1, Public Utilities Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292. General reference for section 32991: Sections 3502.5(a), 3513(k), 3540.1(i), 3543, 3546, 3583.5(a), 71632.5 and 71814, Government Code; Section 99566.1, Public Utilities Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292. General reference for section 32992: Sections 3502.5, 3515.7, 3540.1(i), 3543, 3546, 3583.5, 71632.5 and 71814, Government Code; Section 99566.1, Public Utilities Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292. General reference for section 32993: Sections 3502.5, 3515.7, 3546.5, 3584(b), 3587, 71632.5 and 71814, Government Code; Sections 99566.1 and 99566.3, Public Utilities Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292. General reference for section 32994: Sections 3502.5, 3515.7, 3540.1(i), 3543, 3546, 3583.5, 71632.5 and 71814, Government Code; Section 99566.1, Public Utilities Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292. General reference for section 32995: Sections 3502.5, 3515.7, 3540.1(i), 3543, 3546, 3583.5, 71632.5 and 71814, Government Code; Section 99566.1, Public Utilities Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292. General reference for section 32996: Sections 3502.5, 3515.7, 3540.1(i), 3543, 3546, 3583.5, 71632.5 and 71814, Government Code; Section 99566.1, Public Utilities Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292. General reference for section 32997: Sections 3502.5, 3515.7, 3519.5, 3540.1(i), 3542(d), 3543.6, 3543, 3546, 3546.5, 3563.2, 3564(d), 3571.1, 3583.5, 71632.5 and 71814, Government Code; Sections 99563.8, 99566.1 and 99566.3, Public Utilities Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

POLICY STATEMENT OVERVIEW

PERB first adopted regulations addressing agency fee collection issues in 1989, with the adoption of Subchapter 8, Article 1 of Chapter 1 (sections 32990 through 32997). The Initial Statement of Reasons for the adoption of the new rules read, in part, as follows:

In 1986, the United States Supreme Court issued its decision in Chicago Teachers Union, Local No. 1 v. Hudson, 475 US 292. The Hudson case imposes certain due process obligations upon the collection of agency (or service) fees. These are: (1) adequate explanation of the basis of the fee as verified by an independent auditor, (2) reasonably prompt opportunity to file and have heard any objections before an independent, impartial adjudicator, and (3) escrow of amounts reasonably in dispute pending adjudication.

Hudson followed the significant cases, Abood v. Detroit Board of Education (1977) 431 US 209 and Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (1984) 466 US 435. In Abood, the Supreme Court decided that a non-member employee's rights under the First Amendment were not violated by an agency fee provision provided that the fee covered the exclusive representative's obligation to negotiate and administer the collective bargaining agreement; in essence, the Abood court found that a "no free riders" arrangement was constitutional. The Court, however, did not further delineate between permissible and impermissible expenditures. Then, in Ellis, the Supreme Court held that specific expenditures by the exclusive representative would be reviewed by the following test:

“...(w)hether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.” Ellis at p. 442.

While none of these cases directly involved the three statutes administered by the Public Employment Relations Board (PERB),^[1] the cases were decided by the U. S. Supreme Court and must be followed by PERB in regulating agency fees.

These regulations have been updated as agency fees were authorized under additional statutes and as PERB's jurisdiction was extended to cover additional public sector collective bargaining statutes, but no substantive amendments have been adopted. In August 2004, the California Teachers Association (CTA), on its own behalf and on behalf of several other unions that collect agency fees, proposed that PERB revise the agency fee regulations, urging

¹ In 1989, PERB jurisdiction included only EERA, the Dills Act and HEERA, but HEERA did not provide for the collection of agency fees at that time.

that the regulations be scaled back to address only procedural requirements. The unions argued that subsequent developments in case law made it unnecessary to address substantive issues through the regulations and that maintaining substantive agency fee law in regulation is problematic when new decisions conflict with the existing regulations.

PERB solicited and received comments from other interested parties concerning the proposals submitted by CTA. A workshop discussion was held on March 3, 2005, to allow the interested parties to further discuss these issues with PERB and with one another. Additional written comments and information were submitted by parties following the March 2005 workshop.

In April 2006, based on the comments earlier received, PERB staff prepared a draft of possible revisions to the agency fee regulations and circulated that draft to interested parties, along with an invitation to attend a second workshop discussion on May 16, 2006. PERB again received both written and oral comments.

Following consideration of all comments received from August 2004 through the workshop discussion of May 16, 2006, as well as developments in case law since enactment of the agency fee regulations in 1989, PERB now proposes to adopt the changes summarized below. The focus of the changes is to provide greater clarity, especially with respect to the distinction between objections to payment of nonchargeable expenses and challenges to the calculation of the chargeable and nonchargeable expenditures. The amendments also seek to clarify aspects of the notice and escrow requirements, and to eliminate unnecessary regulations, while updating the regulations consistent with current case law in this area.

INFORMATIVE DIGEST

In section 32990, subsections (a) through (g) would be deleted. The definitional provisions to be deleted simply repeat information already contained in the statutes and reiterate citations also contained in the authority and reference for the section. The remaining language of this section would be revised to make usage of terms more consistent throughout the agency fee regulations.

Section 32991 would be deleted because it simply repeats information concerning the amount of agency fees contained in the statutes.

Section 32992(a) is modified to clarify the obligation of the exclusive representative regarding the content of the notice to agency fee payers. The exclusive representative is obligated to provide each nonmember paying a fee information regarding the amount of the fee. This requirement is consistent with the obligation under the National Labor Relations Board (California Saw & Knife Works (1995) 320 NLRB 224). Language requiring that the nonmember receive the notice is deleted. In addition, section 32992(a) requires that the exclusive representative provide for a procedure to object and a procedure to challenge. The distinction between objecting to paying for nonchargeable expenditures and challenging the exclusive representative's calculations of what is chargeable is blurred in the present regulations. Section 32992(b) is amended to give a union the option of having its expenditures audited or giving a nonmember the opportunity to independently verify the validity of the

exclusive representative's spending claims. However, the amendment to section 32992(b) specifies that the option to provide an unaudited financial report applies only to exclusive representatives whose annual revenues are less than \$50,000. The dollar amount is based on the ruling in Harik v. California Teachers Association (9th Cir. 2003) 326 F.3d 1042 (Harik), and that decision is added to the reference for this section. The language of section 32992(c) is modified in an attempt to clarify, rather than change, when the agency fee notice must be provided, and the relationship of the timing of the notice to the escrow requirements of section 32995.

The present section 32993 would be deleted. The deleted provision requires that the exclusive representative's financial report contain information also required in the notice. Duplication of the information serves no purpose. Proposed new section 32993 requires an exclusive representative to provide a procedure for nonmembers to object to payment of the portions of the fee used for nonchargeable expenditures. As noted above, this requirement is not clearly distinguished in the present regulations from the right to challenge the calculation of the chargeable and nonchargeable expenditures. The proposed new section also clarifies the requirements for the procedure, including the requirement that the procedure allow at least 30 days following the notice for the filing of an objection.

Section 32994 is amended to clarify the right of an agency fee payer to challenge the determination of chargeable expenditures. The revisions delete the misleading use of the term "objector" that is normally used to refer to one who only objects to the spending of his/her fee on nonchargeable expenditures. The amendments clarify various aspects of the required procedures, including the requirement that the procedure allow at least 30 days following the notice for the filing of a challenge.

Revisions to section 32995 clarify the escrow requirements for the exclusive representative to cover both objectors and challengers.

One conforming change in language is proposed for section 32996.

In section 32997, only the Authority section has been modified, to include a reference to Harik that relates to whether the financial statements contained in the notice must be audited (see regulation 32992(c)(2)).

LOCAL MANDATE

This proposal does not impose a mandate on local agencies or school districts.

FISCAL IMPACT ESTIMATES

This proposal does not impose costs on any local agency or school district for which reimbursement would be required pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. This proposal does not impose other nondiscretionary costs or savings on local agencies. This proposal does not result in any costs or savings in federal funding to the state.

COSTS OR SAVINGS TO STATE AGENCIES

No additional costs or savings to state agencies are anticipated.

BUSINESS IMPACT/SMALL BUSINESSES

PERB has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The proposal does not affect small businesses as defined by section 11342.610. The proposal only affects public employees and employee organizations representing public employees.

ASSESSMENT REGARDING EFFECT ON JOBS/BUSINESSES

PERB has determined that this regulatory proposal will not have any impact on the creation of jobs or new businesses or the elimination of jobs or existing businesses or the expansion of businesses in the State of California.

COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

EFFECT ON HOUSING COSTS

None.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Board must determine that no reasonable alternative considered by it, or that has otherwise been identified and brought to the attention of the Board, would be more effective in carrying out the purpose for which the action is proposed, or would be as effective as and less burdensome to affected private persons than the proposed action.

The Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the above-mentioned hearing or during the written comment period.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Board will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office, at the address below. As of the date this notice is published in the California Regulatory Notice Register, the rulemaking file consists of this

notice, the proposed text of the regulations and the Initial Statement of Reasons. Copies of these documents and the Final Statement of Reasons may be obtained by contacting Robin Wesley at the address or phone number listed below.

ADOPTION OF PROPOSED REGULATIONS, AVAILABILITY OF CHANGED OR MODIFIED TEXT AND FINAL STATEMENT OF REASONS

Following the hearing, the Board may adopt the proposed regulations substantially as described in this notice. If modifications are made which are sufficiently related to the originally proposed text, the modified text -- with changes clearly indicated -- shall be made available to the public for at least 15 days prior to the date on which the Board adopts the regulations. Requests for copies of any modified regulations and/or the final statement of reasons should be sent to the attention of Robin Wesley at the address indicated below. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

WEB SITE ACCESS

The Board will maintain copies of this Notice, the Initial Statement of Reasons and the text of the proposed regulations on its web site, found at www.perb.ca.gov, throughout the rulemaking process. The Final Statement of Reasons or, if applicable, notice of a decision not to proceed, will be posted on the web site following the Board's action.

CONTACT PERSONS

Any questions or suggestions regarding the proposed action or the substance of the proposed regulations should be directed to:

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